IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 30TH JANUARY 2007 / 10TH MAGHA 1928

Crl.MC.No. 4130 of 2006()

CC.715/2003 of JUDL.MAGISTRATE OF FIRST CLASS-I, CHERTHALA

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PETITIONER: COMPLAINANT:

UTHAMAN. V., ARUN NIVAS,
ERAMALLOORE P.O., CHERTHALA.

BY ADV. SRI.J.OM PRAKASH

RESPONDENTS:

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1. THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. D. UDAYADAS, PADINJARAPUTHENPURAYIL
THAZHUPPU, PARAYAKAD P.O., CHERTHALA
(PRESIDENT) SNDP BRANCH NO.776.

3. ANI, S/O.PADBHANABHAN,
KOLLANCHERI CHIRA, THAZHUPPU,
PARAYAKAD P.O., CHERTHALA (SECRETARY SNDP
BRANCH NO.776).

4. THE S.N.D.P. BRANCH NO.776,
THAZHUPPU, PARAYAKAD P.O.,
CHERTHALA REPRESENTED BY ITS SECRETARY.

R1 BY PUBLIC PROSECUTOR SRI. GIKKU JACOB
SRI.P.K.BINOY
SRI.R.KIRAN BRIGHT

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 30/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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Crl.M.C.No. 4130 of 2006

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Dated this the 30th day of January, 2007

O R D E R

The petitioner is the complainant in a prosecution under Section 138 of the N.I. Act. According to the petitioner, an amount of Rs.1,50,000/- is due to him under the cheque from the accused. The drawer of the cheque is the third accused, an S.N.D.P. Sakha Yogam. The other accused are the signatories of the cheque - its President and Secretary. Notice of demand was duly issued and received. It did not evoke any response. Later, after the commencement of the trial, a defence appears to have been raised that subsequent to the receipt of the notice of demand there has been discharge of the liability of the amount of Rs.1.5 lakhs due under the cheque by the accused to the complainant. A voucher is pressed into service in support of this contention. When the complainant was in the witness box he denied the said voucher. Later one of the accused went into the witness box in an attempt to prove the said document, which is marked as Ext.D1.

2. The petitioner/complainant found himself in an embarrassing situation. The receipt had not been pleaded in reply to the notice. Strangely though it is the case of the accused that an amount of Rs. 1.5 lakhs had been paid after the notice of demand was issued, the cheque continued to be in the possession of the complainant. No satisfactory explanation appears to have been offered for the continued possess of the cheque by the complainant.

3. The complainant now finds himself in an unenviable situation. Ext.D1, though denied by him, has been thrust into evidence by examination of the defence witnesses. The complainant wants to show that in the normal course such a payment could not have been made by the President or the Secretary without due authorisation from the Managing Committee of the Sakha. In his attempt to disprove Ext.D1, he wanted the Vice President and another Member of the Sakha to be examined as witnesses in an attempt to prove that such payment could not have been made without the knowledge/approval of the Managing Committee. As the complainant's evidence had already been closed, the complainant filed an application under Section 311 Cr.P.C. to examine those witnesses. By the impugned order the learned Magistrate dismissed the said prayer. The

complainant claims to be aggrieved by that order and has come to this Court with a prayer to invoke the powers under Section 482 Cr.P.C. to set aside the said order and to direct the learned Magistrate to invoke the powers under Section 311 Cr.P.C. to permit the complainant to examine those witnesses.

4. The learned Magistrate appears to have felt that examination of the Vice President and another Member of the Managing Committee of the Sakha would offend the constitutional guarantee against self incrimination for the third accused. Less said about this contention the better. There is no element of testimonial compulsion against the third accused when an officer of the third accused in his capacity as such officer is to be examined by the complainant. The theory of self incrimination cannot at all apply.

5. The short question that remains to be considered is whether this is a fit case where the jurisdiction under Section 311 Cr.P.C. ought to be invoked by the learned Magistrate and whether for failure/omission to invoke such jurisdiction the powers under Section 482 Cr.P.C. can or need be invoked by this Court.

6. Having considered all the relevant inputs, I am certainly in agreement with the learned counsel for the petitioner that the denial of

opportunity to the petitioner/complainant to examine the necessary witnesses to prove the falsity and improbability of Ext.D1 would result in miscarriage of justice. This is eminently a fit case where the learned Magistrate must have invoked his powers under Section 311 Cr.P.C. In not invoking such powers, I am satisfied, failure of justice results and to avoid the same, this Court will be justified in invoking the powers under Section 482 Cr.P.C.

7. This Crl.M.C. is in these circumstances allowed. The impugned order is set aside. The learned Magistrate shall grant the petitioner opportunity under Section 311 Cr.P.C. to examine the witnesses as requested by him i.e., the Vice President and a Member of the Managing Committee of the Sakha Yogam.

(R. BASANT)
Judge

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